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Essex County Arc and Civil Service Employees Association, AFSCME, Local 1000, AFL-CIO. Case 3-CA-23939

September 15, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On July 17, 2003, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. September 15, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Robert Ringler, Esq., for the General Counsel.

David F. Horan, Esq. (Horan & Horan LLP), for the Respondent.

Daren Rylewicz, Esq., for the Charging Party.

¹ The General Counsel and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on May 28, 2003, in Plattsburgh, New York. The complaint herein, which issued on January 30, 2003, was based on an unfair labor practice charge and a first and second amended charge filed on November 18 and 25, 2002,¹ and January 22, 2003, by Civil Service Employees Association, AFSCME, Local 1000, AFL-CIO (the Union). The complaint alleges that Essex County ARC (the Respondent) violated Section 8(a)(1) of the Act by engaging in the following activities: (a) On about November 11 and 13, explicitly and implicitly threatening to reduce the employees' benefits if they selected the Union as their collective-bargaining representative; (b) On about November 11, informing its employees that bargaining would start from scratch if the Union was selected as their representative; (c) On about November 7, interrogating its employees about their union activities; (d) On about November 7, directing its employees to refrain from signing union authorization cards; and (e) On about November 7, soliciting grievances from employees and impliedly promising to redress them in order to dissuade employees from supporting the Union.

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

The Union has been conducting an organizing campaign among the Respondent's employees. The unlawful activity that is alleged to have taken place herein occurred at two monthly meetings conducted by the Respondent at two of its residential homes for developmentally disabled persons on either November 11 or 12 at the Jay Peaks facility and on November 13 at the Wells Hill facility. Mary Savage, the Respondent's regional director, and an admitted supervisor and agent of the Respondent, is the individual who is alleged to have made the unlawful statements. In addition, it is alleged that Savage, at Jay Peaks on November 7 in a conversation with one employee overheard by another employee, interrogated employees about union activities, directed them to refrain from signing union authorization cards, and solicited grievances from employees and promised to redress them in order to dissuade employees from supporting the Union.

A. November 7 at Jay Peaks

November 7 was the first day that the Jay Peaks facility was open and Savage came to the facility and spoke to Kelly Fernia,

¹ Unless indicated otherwise, all dates are in 2002.

a residential counselor; Trixie Lee Whalley, another residential counselor at Jay Peaks stood next to Fernia, listening to the conversation. Whalley, who has been employed by the Respondent for 10 years, testified that Savage asked how things were going, and they told her that they were doing fine. Savage then asked them if they heard about the Union coming in and they said that they had, and Savage said that if they had “any questions or any concerns that we could talk to her about it.” Fernia asked Savage if she knew what the union dues would be, and Savage said that it would be between \$40 to 50 a paycheck. Savage also told them not to sign a union card because it could be a legal contract with the Union and that they should “educate” themselves about the Union before signing a card. She also said that they should come to her with any concerns that they had.

Fernia, who testified as a witness for the Respondent, testified that she and Whalley spoke to Savage that evening, but she could not recall anything about the conversation. Savage testified that she went to Jay Peaks on November 7, its first day of operation, and spoke to Whalley and Fernia. She asked them how it was going, and they told her about the day’s events. Whalley asked her if she could leave work 15 minutes early, and Savage asked Fernia if she was comfortable working alone for that period. She said that she was, and Savage told Whalley that she could leave early. There were no discussions of union related subjects. She did tell them to feel free to speak to her about residence matters, as she always tells the employees. She does not recall whether she told them that if they had any problem, they could discuss it with her, although she often tells employees to come to her about anything that’s on their mind, “it isn’t necessarily related to union.”

B. November 11 or 12 at Jay Peaks

In November, there was a monthly meeting at Jay Peaks attended by the staff. Admittedly, Savage came during the meeting and spoke to the employees about the Union, although there is a major credibility issue about what she said. Savage testified that Respondent’s program directors and managers attended a training session in early November, at which time they were told not to question employees about the Union and were given a handout which Savage used in her meetings with employees at Jay Peaks on November 12 and at Wells Hill on November 13.

Whalley testified that she attended the staff meeting at Jay Peaks on November 11;² in addition to herself, there were fellow employees Nancy Enno, Terry Lieberth, Sandy Douglas, Rebecca Simpson, Carol McDonald, Fernia, and Chad Pelky. Savage came into the meeting after it had started with Deborah Laduke, Respondent’s assistant residential director at Jay Peaks, and Cathy Drollette, Respondent’s residential manager at Jay Peaks. At the conclusion of the regular staff meeting, as the employees got up to leave, Savage asked them to sit down, that she had some issues to discuss with them. Whalley saw

² Whalley and Rebecca Simpson testified that this staff meeting took place on November 11. Respondent’s witnesses testified that it took place on November 12. Because it makes no difference to the ultimate issues herein, and because Respondent’s witnesses were more certain of the date, I have assumed that it occurred on November 12.

that she had a document in her hand that she was reading from. She had the document “on her lap, she was flipping the pages. She was looking down on to it and then she was speaking to us.” She saw Savage flipping the pages of the document twice. Savage said that they “shouldn’t be signing any . . . white card . . . because that becomes a binding contract.” That they should “educate ourselves a little bit further.” Savage stated further: “that we would be going to a bargaining table, and while we’re at the bargaining table, the . . . benefits that we have now, such as our time off, could be—we—we do from scratch. Therefore, you know, the benefits we have in the area are the best, and do we want to go back and start from scratch?” She told them that union dues could possibly be \$40 or more a paycheck. When she was asked by counsel for the General Counsel whether Savage gave any examples of benefits that could be lost, she testified:

Our time off, basically. When we go back to the contract—to start with a contract, we would start all over, and our time off was an example, that we would be bargaining for whatever time that we had . . . do we want to negotiate, starting all over again with our time?

McDonald said that she was familiar with the way that unions and employers worked, and that before they went ahead with anything, they should get educated about both sides; that negotiations can be long and hard, and the employees have to be sure that they know what they want. Simpson said that bargaining doesn’t start from scratch; it starts from “where we are now.” She also said that the white card was not a contract.

Simpson, a residential counselor for the Respondent at Jay Peaks, testified that the meeting lasted about 2 hours and 20 minutes. The beginning of the meeting was about the usual subjects of staff meetings, household issues, and then Savage began talking about the union issues. She testified:

[S]he wanted to address the union issues. The union was trying to come in. She said that we would lose our benefits if the union came in, when we went to negotiations, we would start from scratch, and that the union had tried to come in a long time before. They lost members, they were trying to gain back members by coming in again, and they needed the money.

She did not mention any specific benefits that would be lost, only “that we would lose benefits.” Savage also told the employees that dues would be very high, and Simpson said that the dues that she was referring to were for employees earning \$40,000 a year, and she asked if anybody in the room was earning that much. Savage also told the employees that they could go to her with anything that they wanted to discuss, her door was always open.

Fernia testified that when Savage spoke to the employees about the Union, she had papers in her hand and “she read off a paper.” She told the employees to make sure that they get information about the Union. She did not say anything about union dues, about employees losing benefits or that bargaining started from scratch; “I think I asked a question about if you could lose benefits, and then the staff jumped in, Terry and Carol McDonald. They’ve been in the union before, explaining that yes, things can happen, that you—you know, you can lose

or—it—it freezes, everything is negotiable, on the table.” Savage told the employees that they could come to her if they wanted to discuss a workplace issue: “It’s always been that way.”

Laduke testified that Savage gave “a brief introduction to the—union coming” and then read directly from a pamphlet that she had and never used her own words. She told the employees to ask questions in order to educate themselves about what it means to sign a union card. At that point, Lieberth and McDonald began speaking about their experiences with unions. Lieberth said “that if a union comes in, we may have to go to a negotiating table and negotiate our benefits that we . . . have and what we may have . . . we may walk away with not the same benefits that we may have now.” Savage did not reply to this statement. McDonald spoke about union dues. Drollette testified that at the November 12 meeting Savage read some information from a document that Drollette and other of the Respondent’s managers had received that morning from their counsel about dealing with the union issue. Savage didn’t say anything about losing benefits. Lieberth said that she had been employed at a unionized nursing home and “how they could—they could possibly change your benefits or something like that.” When employees asked her questions, she used her own words to answer the questions.

Savage testified that she arrived at the Jay Peaks staff meeting about 15 minutes after it began. About a week earlier, when she and the other managers and program directors attended a training session, they were given a handout about the Union’s attempt to organize the Respondent’s employees. Prior to the November 12 meeting, she read the handout and underlined the portions of the handout that she would read to the employees, and it was only those portions that she read: she “didn’t read the whole document, because I know how boring that can be. I’ve sat in classes where people have done that.” She read verbatim from the portions of the handout that she underlined: “I’m a former college professor and I don’t ad lib anything, especially if there’s important points.” She read the following from the handout prepared by counsel for the Respondent:

Signing a card is like signing a blank check and . . . the cards are applications for membership in the union.

A Union authorization card is a legal document that can bind employees to the Union’s constitution and by-laws for years beyond the point when they have lost interest in the Union.

All union constitutions contain scores of pages of fine print with which all members must comply. Members who violate a union’s constitution can be fined, suspended or expelled.

Unions will make wild promises and misrepresentations in order to get you to sign cards. Union organizers will say anything in order to get these cards signed because they need to replace the losses in dues caused by thousands of lost members.

After she read these sections, she told the employees to “find out as much as you can . . . you need to make an informed decision.” Following that, “there was a great deal of discussion.” McDonald spoke about her husband’s experience with the Union, pros and cons; she said that in negotiations there were no

guarantees and that dues were taken out of his pay. Lieberth said that she worked at a nursing home that was nonunion when she started, and a union came in. Negotiations were difficult, resulting in a loss of benefits, although she did not get into specifics. Whalley, whose husband was a member of the Union, said that the Union was “a positive experience.” Fernia and Douglas also spoke, but she did not testify about what they said. She was asked:

Q. Do you recall what questions you were asked at Jay Peaks by employees?

A. There weren’t necessarily questions directed at me. It was more comments and questions out there, and then somebody else would pick up the response, someone else in the staff meeting. Residential counselors, not management.

Q. So you didn’t respond to any of these statements and/or questions at Jay Peaks?

A. No. I did—I did not need to.

In addition to reading from the handout, and telling the employees to make an informed decision, she spoke about “the positive points of the agency. . . . No layoffs, twenty plus years, excellent benefits package. . . . And ability to work things out with the manager, flexibility.”

C. November 13 at Wells Hill

There was similar meeting held at Wells Hill, a five-bed residential home, on November 13. Wells Hill generally has monthly staff meetings where they discuss the residents, services, household matters, and staff issues. In attendance were counselor Charlene Gough, and staff members Megan MacDougal, Martha Bacchus, Sandy Denton, three service coordinators, and House Manager Lee Ann Clark. After the meeting commenced, Savage and Rebecca Spanfelder, Respondent’s assistant residential director, joined the meeting. Before Savage and Spanfelder came in they discussed resident issues. Afterward, they discussed the Union. Gough testified that Savage said that the Union wanted to take a large part of their paycheck as dues and Gough responded that union dues were only 1 percent of their pay, but Savage interrupted her and said that she would give her an opportunity to respond after she finished speaking. Savage said that the Union was known for striking, and they were presently engaged in a strike in Buffalo. She testified further: “She went on to say that if the union came in, that they would take away our benefits, and then she stated . . . she was talking about how we had a good health insurance package and that we could also lose that.” Gough then asked her “if that was coercion at the beginning of the meeting, and she said no, she just wanted to give us more information about the union.” As to whether Savage was reading her statement from an outline or notes, she testified: “I don’t recall her having anything. She may have, but I don’t really recall.” Gough took notes of this staff meeting; these notes were received in evidence. The notes of the first part of the meeting were taken contemporaneously; the notes of what Savage said were written after the meeting. In these notes, Gough states that Savage spoke about the Union wanting the employees to sign cards and that dues could take a lot of money out of their paychecks.

When Gough tried to speak, Savage stopped her and told her that she would be given a chance to speak later, but she never was given the opportunity, and she wrote: "This made me feel like I couldn't say anything. I was intimidated—made to feel that what I had to say wasn't worth anything. That I was less of a person than her." She also states in these notes: "In the course of the meeting, a lot of false information was given—Mary Savage stated that the CSEA likes to strike and we could lose our benefits." The words "very possibly" before "lose our benefits" was crossed out.

MacDougal, who was employed by the Respondent as a residential counsel at Wells Hill from February until November, testified that after the regular staff meeting had gone on for about a half an hour on November 13, Savage and Spanfelder joined the meeting. Savage told them "what would happen if we were to have a union, and she said that we could lose our benefits if this is what happened, and we could go on strike." In answer to questions on cross-examination, she testified that Savage said that if the Union came in it was possible that they would lose benefits. She does not recall whether Savage was reading from a document at the meeting.

Spanfelder testified that after the regular staff meeting had concluded, Savage read from the handout that she was holding. She told the employees to learn more about the Union before signing an authorization card. She did not say that the employees might lose benefits, nor did she threaten to reduce their benefits or health insurance. In addition, employees asked questions. When Savage answered the questions, she did so in her own words. An employee asked a question about union dues and Savage answered that there would be dues. In addition, Gough said that she thought what Savage was saying was coercive. Savage also said that a strike was a possibility with any union, but no specific employer was named. Clark testified that Savage read from a booklet that she had. It was the same booklet that had been given to all of the Respondent's supervisors and managers. In addition, she spoke about the history of the organization and that there had never been layoffs. During this presentation, she never said that employees would lose benefits or health benefits.

Savage testified that she arrived at the Wells Hill meeting between 30 and 45 minutes after it began. She told the employees that she wanted to give them some information in order for them to become educated and to know what questions to ask in order to make an informed decision about the Union. "And then I proceeded to read the pages that I had read at the Jay Peaks meeting." Just as she began, Gough said, "Isn't this coercion?" Savage told her that she wanted to read what she had, and that she would entertain questions when she had concluded her presentation. In addition to reading from the document that she had, she told the employees of the Respondent's history: "twenty plus years, no layoffs, excellent benefits package, flexibility in talking to your manager." After she read the item about union dues, Gough spoke and said that the union dues are a certain percentage of salary; Savage did not respond. Savage testified that at no time in this meeting did she indicate that the employees might lose benefits.

IV. ANALYSIS

There is a clear credibility issue herein. If I believe Savage and the Respondent's other witnesses the complaint must be dismissed. If I believe counsel for the General Counsel's witnesses, violations must be found. None of the witnesses were obviously incredible, although some, such as Simpson and Fernia had difficulty remembering the events of November. Counsel for the General Counsel, in his brief, argues that the Respondent's witnesses' testimony was inconsistent because, in his cross-examination of them, their recollection of the meetings length varied from 5 to 7-1/2 minutes for the Jay Peaks meeting, and from 8 to 20 minutes for the Wells Hill meeting. That is not surprising since the meetings took place more than 6 months earlier, they lasted about 2 hours, and a lot was said in the meetings, both about the residences and the Union. I would be both surprised and suspicious if they all agreed on how long the meetings lasted.

With some difficulty, I credit the testimony of Savage. After observing her on the witness stand, I find that she is not the type of person to "wing it" or "ad lib." The testimony establishes that early in November she and the other managers and supervisors attended a training session on how to deal with the Union's organizational drive. They were given a nine-page booklet entitled: "Information for Essex County ARC Managers and Supervisors on Third Party Intervention." Her testimony about underlining certain parts of this booklet and reading only those portions, seems perfectly credible. She appeared to be a controlled person who would not vary from the written words prepared by the Respondent's attorneys. That is not to say that I found Counsel for the General Counsel's witnesses such as Whalley, Simpson, and Gough to be clearly incredible. Rather, because I found Savage's testimony, as supported by Laduke, Drollette, Spanfelder, and Clark, more credible than theirs, I credit her testimony. I therefore find that at the November 12 and 13 staff meetings at Jay Peaks and Wells Hill, she read verbatim from the handout prepared by counsel for the Respondent and that nothing said therein, or otherwise said at these meetings, violates the Act.

The allegations regarding the November 7 discussion between Savage and Fernia and Whalley is more difficult because it was a conversation rather than a presentation read from prepared notes. Fernia's testimony regarding this discussion is of no value because she could remember nothing about the meeting. There is a clear conflict between the testimony of Whalley and Savage. As between the two, although with some difficulty, I credit Savage. Even though it is not clear whether Savage and the other supervisors and managers attended the training session of what they could do or say prior to this conversation, my observation of Savage convinces me that it would be out of character for her to make the statements that Whalley attributes to her. Rather, I find it more likely that this was simply a conversation about Whalley's request to leave work early and how they coped with Jay Peaks' first day of operation, as testified to by Savage. I therefore recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent did not violate Section 8(a)(1) of the Act as alleged in the complaint.

Based on the above, I issue the following recommended³

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

ORDER

Having found and concluded that the Respondent has not engaged in the unfair labor practices alleged in the complaint herein, the complaint is dismissed in its entirety.

Dated, Washington, D.C. July 17, 2003

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.